In the District Court of the United States for the Northern District of Illinois

CIVIL 4605

T. A. DRAKE ET AL., PLAINTIFF-APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' petition to set aside an order of the Interstate Commerce Commission entered March 21, 1942. Suit was brought on August 25, 1942, in which appellants [1] were permitted to intervene as plaintiffs. Findings of fact, conclusions of law, and the final decree were entered by the District

[1] The original plaintiffs, T. A. Drake, T. C. Jack Burroughs, and William Henry Maguire, do not join in this appeal.

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Court on November 18, 1942. An appeal was allowed on December 18, 1942, and the appeal papers were served[1] upon the United States Attorney in Chicago on that date.

The order of the Commission was issued pursuant to Section 203 (b) (7a) and (9)[2] of Part II of the Interstate Commerce Act, 49 Stat. 545–

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[1] Appellants have never directly served these papers upon the Attorney General and it was not until December 28 that they were received by the attorneys handling the case for the United States. The required notice directing attention to the provisions of Rule 12, paragraph 3, was never given, and the Interstate Commerce Commission has not yet been served with the appeal papers. These facts are mentioned to explain why we believe this motion is properly filed in the District Court under Rule 12, paragraph 3, despite the expiration of more than 15 days from the date of service upon the United States Attorney.

[2] Section 203 (b) (7a) and (9) provides in part:

"* * * nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: * * * the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit."

546, 52 Stat. 1029, 54 Stat. 919, 921 (49 U. S. C. 303 (b) (7a) and (9)). This Section exempts casual, occasional, or reciprocal transportation by motor vehicle from most of the regulatory provisions of that Act, but permits the Commission to remove this exemption upon a finding that, and to the extent that the Commission shall find that, removal is necessary to carry out the national transportation policy [1] declared in the Act. The order in this case removes the exemption to the extent hereinafter indicated. It was made in accordance with the conclusions reached by the Commission in a report of March 21, 1942 (33 M. C. C. 69), which was the result of its extensive

[1] The declaration of policy provides:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each: to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy (54 Stat. 899, 49 U. S. C. preface to sec. 1)."

national investigation [5] of the casual motor transportation field.

In its report the Commission found that there was a widespread practice of travel under so-called "share-expense" arrangements whereby motor-car operators, traveling casually for purposes other than transportation, carry passengers who share expenses. In connection with this type of this transportation, it was found that numerous travel bureaus have sprung up which, for compensation, bring together prospective operators and passengers.

The Commission found that numerous complaints concerning transportation furnished by such bureaus had been lodged with law enforcement agencies and travellers' aid bureaus. It stated that passengers had related instances where they had been abandoned en route, sometimes with loss of baggage; where personal injuries were suffered; where there were delays owing to the arrest of the drivers for violations of law; where circuitous routes were used to avoid apprehension by authorities; where there were crowded conditions caused by the transportation of excess numbers of passengers; and where fright and anxiety were occasioned by reckless driving, bad mechanical

[5] The investigation was launched upon the petition of the National Bus Traffic Association, which, with numerous railroad passenger associations, intervened in the District Court as defendants. Public hearings were held by the Commission throughout the country.

condition, and fatigue of drivers. It found that this was a cheap method of transportation frequently employed by those in poor financial straits upon whom the difficulties encountered were especially burdensome, and that insurance policies furnished little protection against these hazards. The Commission found too that in many cases these travel bureaus actually used and abetted regular operators who were operating without certificates of public convenience and necessity in defiance of the Interstate Commerce Act, the travel bureaus acting as a screen for these illegal operators. The Commission further found that public safety and convenience were matters to be considered in regulating motor-carrier operations from the standpoint of the national transportation policy. As its ultimate finding, as required by the statute, it stated that "in order to carry out the national transportation policy, the exemption of the casual, occasional or reciprocal transportation of passengers should be removed to the extent necessary to make applicable all provisions of the act to such transportation when sold, offered for sale, provided, procured, furnished, or arranged for by any person who sells, offers for sale, provides, furnishes, contracts, or arranges for such transportation for compensation, or as a regular occupation or business." The present order removing the exemption to this extent was then issued.

It is believed by appellees that this order will

have a two-fold effect. It will subject casual operators who make use of travel bureaus or paid travel agents to those regulatory provisions of Part II of the Interstate Commerce Act pertaining to motor carriers, but actually only to those provisions dealing with contract[6] rather than common carriers. It will also subject travel bureaus arranging such transportation to the provisions dealing with brokers. By its own limitations, the order has no effect upon casual operators not using travel bureaus or paid agents.

On May 12, 1942, four of the nine appellants, who, it is understood, conduct travel bureaus of this type in various Texas cities and do business with interstate and intrastate passengers, filed with the Commission a petition for rehearing and reconsideration. This petition cited certain changes in national transportation conditions wrought by the advent of war subsequent to the closing on May 10, 1941, of the record on which the Commission's order was based. The petition stated that the President had called upon private car owners to share their cars. It pointed out that railroads and bus companies were no longer able to serve adequately the greatly expanded public passenger transportation needs of the country because of increased civilian travel in connection with defense jobs, military demands, and the re-

[6] This is apparent from an examination of the definitions of common and contract carriers under the Act. Cf. secs. 203 (a) (14) and 203 (a) (15).

duction in private motor car travel due to the freezing of tires and auto stocks. These factors were said to emphasize the need for travel bureaus dealing in casual private motor car transportation. The petition was denied by the full Commission on July 31, 1942.

Even though this is a novel case, the decree of the District Court should be affirmed without argument because no substantial issues of law are involved. Three principal arguments were made before the District Court and are now repeated in the assignments of error: (1) that the delegation of power to the Commission in Section 203 (b) to remove the exemption of casual motor vehicle transportation represents an unconstitutional delegation of legislative power; (2) that the Commission's order deprives appellants of property without due process of law in violation of the Fifth Amendment; (3) that the failure of the Commission to grant the petition for rehearing was an abuse of discretion and deprived appellants of a fair hearing in violation of the due process clause of the Fifth Amendment.

(1) It is settled by many decisions of this Court that, where Congress prescribes a sufficiently definite standard for administrative action, it may constitutionally delegate to an administrative agency the power to determine both when and to what extent a statutory policy shall be applied in particular situations. *Field* v. *Clark,* 143 U. S.

649; *Intermountain Rate Cases,* 234 U. S. 476; *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S. 394; *United States* v. *Rock Royal Cooperative,* 307 U. S. 533, 574; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 144–146. Nor, as the first three of these cases indicate, is it of any importance that, by virtue of the prescribed administrative action, the rule applicable in a particular case becomes entirely different from the statutory rule otherwise applicable. The delegation in Section 203 (b) follows precisely such a pattern. That the standard of the national transportation policy is sufficiently definite is established by numerous cases in which this Court has upheld other standards no less broad than this, many of them involving other aspects of the Interstate Commerce Act. *Intermountain Rate Cases,* 234 U. S. 476; *Chesapeake & Ohio Railroad* v. *United States,* 283 U. S. 35; *New York Central Securities Co.* v. *United States,* 287 U. S. 12; *United States* v. *Rock Royal Cooperative,* 307 U. S. 533. This same standard has, moreover, been sustained against attack in a well-considered decision of a three-judge district court. *Noeding Trucking Company* v. *United States,* 29 F. Supp. 537 (D. C. N. J.).[1]

[1] This case involved the removal of another exemption contained in Section 203 (b) and the constitutionality of the standard declared in Section 202 (a) of the original Motor Carrier Act which, except for the fact that it applied only to motor carriers, was otherwise virtually the same as the pres-

(2) There appears to be no attack made under the due process clause on the validity of the order of the Commission insofar as it directly affects travel bureaus. The only direct effect would be to subject them as brokers to the licensing provisions of Section 211 of the Interstate Commerce Act (49 U. S. C. 311), and such regulation is clearly valid. *Martin* v. *United States,* 100 F. (2d) 490 (C. C. A. 10th), certiorari denied, 306 U. S. 649; *California* v. *Thompson,* 313 U. S. 109. Rather, the primary attack is based upon the indirect effect which it is said the order will have on travel bureaus. This attack proceeds upon the assumption that private motor-car operators who might in the future desire to employ these bureaus could not legally do so without subjecting themselves to regulation by the Commission, so burdensome as completely to discourage such use. Thus, it is argued that appellants would in effect be prohibited [8] from engaging in a lawful business.

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ent national transportation policy. The court's opinion carefully distinguishes *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, and *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, upon which appellants principally rely.

[8] While the courts of Texas have held that a state statute regulating travel bureaus violated the due process clause of the Fourteenth Amendment where it was construed actually to prohibit their operation (*Ex parte Martin,* 127 Tex. Cr. 25, 74 S. W. (2d) 1017), the courts of two other states have indicated that state legislatures may constitutionally prohibit operations by these bureaus. *Bowen* v. *Bannah,* 167 Tenn. 451, 71 S. W. (2d) 672; *Francis* v. *Allen,* 54 Ariz. 377, 96 P. (2d) 277.

We do not believe, however, that it can reasonably be assumed that this order will have the prohibitory effect which appellants foresee. As previously indicated, this order will subject private motor-car operators desiring to use these travel bureaus in connection with interstate travel only to the regulatory provisions of the Interstate Commerce Act dealing with contract carriers. These obligations are slight. Such a carrier is required to receive a permit from the Commission, but a permit may be granted without hearing (sec. 209 (b)). Having secured a permit, a contract carrier may make any number of separate similar contracts for passengers (*ibid.*). The Commission may fix by rule the amount and type of insurance to be carried (sec. 215) and the type of reports, if any, to be filed (sec. 220 (a)). The carrier fixes its own rates except that it may not offer rates below reasonable minima contained in schedules required to be kept on file by it with the Commission and except that the Commission may prescribe reasonable minimum rates when the rates are found by it to be below a reasonable minimum (sec. 218). The carrier pays no fees to the Commission. Regulation to this extent is clearly not prohibitory.

But, even asuming that the order would in effect prevent this kind of travel bureau from conducting such part of its business as might be in interstate commerce, the order does not thereby become invalid. It is now well settled that the

federal interstate commerce power includes the right to prohibit interstate commerce. *United State* v. *Darby,* 312 U. S. 100, 113 (and cases there compiled). Nor does prohibition against use of the channels of interstate commerce infringe the Fifth Amendment, where, as here, prohibition is an appropriate means of preventing injury to the public from the menace presented. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 148. Whether the public might have been protected by measures short of complete prohibition is a matter for the legislative, rather than the judicial, judgment. *United States* v. *Carolene Products Co., supra,* 151. And the due process clause does not condemn this order merely because appellants' own conduct may have been innocuous or because in their individual cases the order may work an inequitable result. *Purity Extract & Tonic Co.* v. *Lynch,* 226 U. S. 192, 201; *Wickard* v. *Filburn,* No. 59, this Term, decided November 9, 1942, pamphlet p. 13.

It has been urged as well that the order effects an unreasonable classification because it does not apply to casual operators not using travel bureaus. But the Fifth Amendment contains no equal protection clause and allows the greatest liberality in classification. *Currin* v. *Wallace,* 306 U. S. 1, 14; *United States* v. *Carolene Products Co., supra,* 151. Further, there is here a reasonable distinction for regulatory purposes, since operators who employ travel bureaus, obvi-

ously, through the facilities of such bureaus, reach a much larger segment of the public than do other operators. Besides, those who deal with casual operators through travel bureaus would normally deal, to a much greater degree, with operators with whom they were not acquainted and who might be more likely to take advantage of them.

(3) The contention that the denial by the Commission of appellants' petition for rehearing was an abuse of discretion and unconstitutionally deprived them of a fair hearing is based entirely upon the doctrine enunciated by this Court in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248. There this Court held that such was the result where the Commission dismissed a petition for rehearing filed by the western railroads in a case in which the Commission had fixed grain rates in the entire western district. In that case, the petition urged that the late "depression," for which appellants substituted the present war, supervening subsequent to the closing of the record before the Commission but prior to its order, with its drastic effect upon carrier revenues, rendered the Commission's record entirely obsolete. However, the *Atchison* case rests upon its exceptional facts, and its rule may not be invoked to disenable the Commission to protect the public. *Baltimore & Ohio Railroad Co.* v. *United States,* 298 U. S. 349, 389; *United States* v. *Northern Pacific Ry.,* 288 U. S. 490, 494. We submit that it is not applicable here.

The petition for rehearing in the *Atchison* case was filed by all the carriers affected; that in the present case by only a very few of the travel bureaus affected by the Commission's order. In that case, since carrier earnings were naturally of great importance in determining rates, the changed conditions affecting those earnings were clearly of the utmost materiality. Here, however, the changed conditions, which are said to establish the inability of public transportation facilities to meet the increased transportation needs, and thus the greater necessity for private operations, do not go to a material consideration, for the applicable statutory provisions did not direct the Commission to consider issues of "public convenience and necessity," and its order was not based upon any conclusion that the public necessity did not require private motorcar operations through travel bureaus. Instead, it was based upon the conclusion that the manifold abuses in the part of the private transportation field dominated by travel bureaus, a limited part of that field, established the public need for supervision thereof by an expert governmental agency. Even if questions of public necessity for these operations were material, the war-born conditions advanced by appellants have reduced rather than increased the need for such operations. Appellants relied primarily on the factor of war-induced shortages of vital materials such as rubber, to which gasoline must now be added. But the paramount, relevant wartime pub-

lic necessity, that of conserving these materials, requires that private motorcar operations which are notoriously wasteful, be kept at a minimum and be carefully regulated. If these changed conditions have not already actually rendered impossible throughout a large part of the country the type of private operations with which appellants are concerned, they at least serve to emphasize the wisdom of the Commission's original determination and the propriety of its dismissal of the petition for rehearing.

For the foregoing reasons it is evident that the errors assigned by appellants are without substance. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

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